U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

(b)(6)

DATE: SEP 2 6 2013 OFFICE: TEXAS SERVICE CENTER FILE:

IN RE: Petitioner:
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

SELF-REPRESENTED

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office (AAO) in your case.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at http://www.uscis.gov/forms for the latest information on fee, filing location, and other requirements.** *See also* 8 C.F.R. § 103.5. **Do not file a motion directly with the AAO.**

Thank you,

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Texas Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a law practice. It seeks to employ the beneficiary permanently in the United States as a lawyer. As required by statute, the petition is accompanied by ETA Form 9089, Application for Permanent Employment Certification, approved by the United States Department of Labor (DOL). The director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition. The director denied the petition accordingly.

The record shows that the appeal is properly filed, timely and makes a specific allegation of error in law or fact. The procedural history in this case is documented by the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary.

As set forth in the director's February 28, 2013 denial, the issue in this case is whether or not the petitioner has the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence.

Section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2), provides immigrant classification to members of the professions holding advanced degrees or their equivalent and whose services are sought by an employer in the United States. An advanced degree is a United States academic or professional degree or a foreign equivalent degree above the baccalaureate level. 8 C.F.R. § 204.5(k)(2).

The regulation at 8 C.F.R. § 204.5(g)(2) states in pertinent part:

> *Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the ETA Form 9089, Application for Permanent Employment Certification, was accepted for processing by any office within the employment system of the DOL. *See* 8 C.F.R. § 204.5(d). The petitioner must also demonstrate that, on the priority date, the beneficiary had the qualifications stated on its ETA Form 9089, as certified by the DOL and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Acting Reg'l Comm'r 1977).

Here, the ETA Form 9089 was accepted on September 4, 2012. The proffered wage as stated on the ETA Form 9089 is $82,250 per year. The ETA Form 9089 states that the position does not require experience in the offered position.

The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.[1]

The evidence in the record of proceeding shows that the petitioner is structured as a sole proprietorship. On the petition, the petitioner failed to indicate the year it was established or the number of workers it currently employed, as required. On the ETA Form 9089, signed by the beneficiary on November 30, 2012, the beneficiary claimed to have worked for the petitioner as a researcher from March 1, 2011 through December 31, 2011 in a part-time capacity.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA 9089 labor certification application establishes a priority date for any immigrant petition later based on the ETA 9089, the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. The petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg'l Comm'r 1977); *see also* 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, United States Citizenship and Immigration Services (USCIS) requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered wages, although the totality of the circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. *See Matter of Sonegawa*, 12 I&N Dec. 612 (Reg'l Comm'r 1967).

In determining the petitioner's ability to pay the proffered wage during a given period, USCIS will first examine whether the petitioner employed and paid the beneficiary during that period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. Here, the petitioner's response to the AAO's Request for Evidence (RFE), dated July 11, 2013, indicates that it has not employed the beneficiary in 2012 or 2013. Accordingly, the petitioner has not established that it employed and paid the beneficiary the full proffered wage, or any wages, from the September 4, 2012 priority date onwards.[2]

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during that period, USCIS will next examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. *River Street Donuts, LLC v. Napolitano*, 558 F.3d 111 (1st Cir. 2009); *Taco Especial v.*

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[1] The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by the regulation at 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any of the documents newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

[2] The record contains the beneficiary's 2011 IRS Form 1099, Miscellaneous Income, showing that the beneficiary received $8,000 in wages from the petitioner in that year. As these wages are from before the 2012 priority date, they will not establish the petitioner's ability to pay the beneficiary proffered wage from the September 4, 2012 priority date onward.

Napolitano, 696 F. Supp. 2d 873 (E.D. Mich. 2010), *aff'd*, No. 10-1517 (6th Cir. filed Nov. 10, 2011). Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); *see also Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983).

The petitioner is a sole proprietorship, a business in which one person operates the business in his or her personal capacity. Black's Law Dictionary 1398 (7th Ed. 1999). Unlike a corporation, a sole proprietorship does not exist as an entity apart from the individual owner. *See Matter of United Investment Group*, 19 I&N Dec. 248, 250 (Comm'r 1984). Therefore the sole proprietor's adjusted gross income, assets and personal liabilities are also considered as part of the petitioner's ability to pay. Sole proprietors report income and expenses from their businesses on their individual (Form 1040) federal tax return each year. The business-related income and expenses are reported on Schedule C and are carried forward to the first page of the tax return. Sole proprietors must show that they can cover their existing business expenses as well as pay the proffered wage out of their adjusted gross income or other available funds. In addition, sole proprietors must show that they can sustain themselves and their dependents. *See Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). The sole proprietor's ability to pay the beneficiary the proffered wage would be determined from the sole proprietor's adjusted gross income (AGI), reported on IRS Form 1040, line 37 (in 2011), and personal assets and liabilities, as stated above.

In *Ubeda*, 539 F. Supp. at 650, the court concluded that it was highly unlikely that a petitioner could support himself, his spouse and five dependents on a gross income of slightly more than $20,000 where the beneficiary's proposed salary was $6,000 or approximately thirty percent (30%) of the petitioner's gross income.

However, in the instant case, the record does not contain the petitioner's tax returns, audited financial statements, or annual reports from the priority date onward as required pursuant to 8 C.F.R. § 204.5(g)(2). The record before the director closed on February 12, 2013 with the receipt by the director of the petitioner's submissions in response to the director's RFE. As of that date, the petitioner's 2012 federal income tax return was not yet due. Therefore, the petitioner's income tax return for 2011 was the most recent return available. Although the AAO's July 11, 2013 RFE later requested the petitioner's 2012 tax return, the petitioner indicated that it had not yet filed the 2012 tax return with the IRS and provided a copy of its request to IRS for a six month extension of time to file. Accordingly, the sole proprietor's AGI for 2012, which encompasses the priority date in this case, cannot be determined. The petitioner did not alternatively submit an audited financial statement, or annual report, permitted by regulation. Therefore, from the 2012 priority date onward, the petitioner did not establish that it had sufficient net income (AGI) to pay the beneficiary the proffered wage.[3]

[3] The petitioner's 2011 tax return, Schedule C, from before the 2012 priority date, shows the sole proprietor's AGI for that year as $15,798. Additionally, the sole proprietor reports self-estimated

In the instant case, the sole proprietor indicates she is willing to use her personal assets and property to establish the petitioner's ability to pay the proffered wage. The record indicates that the sole proprietor supports a family of four. However, as previously discussed, the record does not contain the sole proprietor's 2012 tax return, and thus, the AAO cannot accurately determine whether the adjusted gross income for that year was sufficient to cover the proffered wage of $82,250 per year and still support the sole proprietor and her three dependents. The director, however, utilized the sole proprietor's AGI of $15,798 as reported in the 2011 tax return as an estimate figure in analyzing the petitioner's ability to pay the proffered wage from the 2012 onward, after deducting the sole proprietor's expenses. As the sole proprietor initially reported her monthly expenses as $18,675 ($224,100 per year) for the period from January 1, 2012 to January 15, 2013, the director concluded that the petitioner had not established that the sole proprietor of the petitioning entity had sufficient funds to support herself or her dependents based on her AGI after deducting the reported expenses. On appeal, the petitioner asserts that the reported expenses are in fact $18,675 per year and submits supporting evidence of the sole proprietor's monthly expenses. However, the AAO observes that the sole proprietor's reported 2011 AGI of $15,798 is still insufficient to cover the full proffered wage of $82,250, even before the sole proprietor's expenses are paid.

The petitioner asserts, however, that the record establishes its ability to pay the full proffered wage under a totality of the circumstances analysis as articulated in *Matter of Sonegawa,* 12 I&N Dec. 612 (Reg'l Comm'r 1967). USCIS may consider the overall magnitude of the petitioner's business activities in its determination of the petitioner's ability to pay the proffered wage. *See id.* The petitioning entity in *Sonegawa* had been in business for over 11 years and routinely earned a gross annual income of about $100,000. During the year in which the petition was filed in that case, the petitioner changed business locations and paid rent on both the old and new locations for five months. There were large moving costs and also a period of time when the petitioner was unable to do regular business. The Regional Commissioner determined that the petitioner's prospects for a resumption of successful business operations were well established. The petitioner was a fashion designer whose work had been featured in *Time* and *Look* magazines. Her clients included Miss Universe, movie actresses, and society matrons. The petitioner's clients had been included in the lists of the best-dressed California women. The petitioner lectured on fashion design at design and fashion shows throughout the United States and at colleges and universities in California. The Regional Commissioner's determination in *Sonegawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere. As in *Sonegawa*, USCIS may, at its discretion, consider evidence relevant to the petitioner's financial ability that falls outside of a petitioner's net income and net current assets. USCIS may consider such factors as the number of years the petitioner has been doing business, the established historical growth of the petitioner's business, the overall number of employees, the occurrence of any uncharacteristic business expenditures or losses, the petitioner's reputation within its industry, whether the beneficiary is replacing a former employee or an outsourced service, or any other evidence that USCIS deems relevant to the petitioner's ability to pay the proffered wage.

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annual household expenses of $18,675, discussed further below, which is in excess of the sole proprietor's AGI even before considering the beneficiary's proffered wage.

In the instant case, however, the record lacks any evidence of the petitioner's historical financial growth to support a claim of ability to pay under the totality of circumstances analysis. The AAO observes that the only tax return for the petitioner in the record is its 2011 tax return, which was before the priority date and indicates that the sole proprietor had an adjusted gross income of $15,798 in that year and that the petitioning business had gross receipts of only $55,000, both of which are significantly less than the proffered wage of $82,250 here. As there are no financial records for the petitioner for the time before or after 2011, the AAO cannot meaningfully assess whether the petitioner's 2011 adjusted gross income is the norm for the petitioning business or if this was an aberration caused by uncharacteristic business expenditures or losses. If the latter, the record lacks any evidence of such expenditures or losses to even suggest that the petitioner's adjusted gross income was likely to increase back to its norm to sufficiently establish its ability to pay the proffered wage from the 2012 priority date onward. Further, if the 2011 adjusted gross income $15,798 is indeed the norm for the petitioner, it would be insufficient to establish the petitioner's ability to pay the proffered wage of $82,250, even before deducting the sole proprietor's reported monthly self-estimated expenses of approximately $1,852.32, or $22,227.84 per year.[4] Additionally, the AAO's July 2013 RFE specifically requested the petitioner's 2011 Schedule C as evidence of the petitioner's sole proprietor status and business. However, the AAO observes that the petitioner did not report any wages or cost of labor on the 2011 Schedule C to exhibit any full-time employees.[5]

The petitioner also submitted a sworn document, entitled "Estimated Profit & Loss Statement" for the period from January 1, 2012 to January 15, 2013, asserting that the petitioner's total net income for that period, after deducting business expenses, was $61,417. In addition, the sole proprietor proffered website printouts of her 401(k) Savings Plan with [redacted] showing a balance of $47,502.30 as of January 30, 2013, and her 403(b) account with [redacted] indicating a balance of $20,749.16 as of May 14, 2012. The petitioner asserts that the petitioner's net income ($61,417) reported on the profit and loss statement and the sole proprietor's personal assets (totaling $68,251) from her 401(k) and [redacted] 403(b) accounts, after deducting her total annual household expenses, are sufficient to establish the petitioner's ability to pay the prorated proffered wage of $26,590 for 2012 (beginning from September 4, 2012 until December 31, 2012). It is unclear, however, that all of the funds from the sole proprietor's 401(k) and 403(b) retirement

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[4] The AAO notes that the annual total indicated here of $22,227.84 does not match the annual total of expenses of $18,675 provided by the sole proprietor. It appears, however, that the sole proprietor estimated the annual expenses in each category, referencing the fluctuating nature of some of the expenses, rather than utilizing the same monthly figure in each category for each month to calculate the annual total. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

[5] The offered position on a labor certification must be a full-time position. *See* 20 C.F.R. §§ 656.3; 656.10(c)(10). Although the petitioner is not obligated to employ the beneficiary on a full-time basis until after the latter has obtained lawful resident status in the United States, it does have the burden to show that offered position on the labor certification will be for a full-time position.

accounts can be used or whether an early withdrawal penalty would apply, thereby reducing the funds that may otherwise be available to establish the petitioner's ability to pay the proffered wage.

As an initial matter, the petitioner indicates that the proffered wage should be prorated for the portion of the year that occurred after the priority date. We will not, however, consider 12 months of income towards an ability to pay a lesser period of the proffered wage any more than we would consider 24 months of income towards paying the annual proffered wage. While USCIS will prorate the proffered wage if the record contains evidence of net income or payment of the beneficiary's wages specifically covering the portion of the year that occurred after the priority date (and only that period), such as monthly income statements or pay stubs, the petitioner has not submitted such evidence.

Further, the petitioner's reliance on unaudited financial records, namely the document in the record titled profit and loss statement, to establish its ability to pay is also misplaced. The regulation at 8 C.F.R. § 204.5(g)(2) makes clear that where a petitioner relies on financial statements to demonstrate its ability to pay the proffered wage, those financial statements must be audited. As there is no accountant's report accompanying the profit and loss statement, the AAO cannot conclude that it is an audited statement. The unaudited financial statement here is the representation of the sole proprietor, which does not constitute reliable evidence and is insufficient to demonstrate the ability to pay the proffered wage. As previously discussed, the petitioner's net income here is calculated based on the sole proprietor's AGI, not based on an unaudited financial statements. The petitioner must further show that the sole proprietor's AGI and assets are sufficient to cover the latter's personal expenses, as well as the full proffered wage. In this case, the sole proprietor has not shown that she could support herself and three dependents and pay the full proffered wage to the beneficiary from the 2012 priority date onward, particularly where the only tax return in the record for the petitioner from 2011 shows the petitioner's gross income to be slightly more than $15,000 and the beneficiary's proposed salary is $82,250. *See Ubeda*, 539 F. Supp. at 650.

The petitioner also asserts that it has reasonable expectations of future financial profit due to upcoming immigration reform and the sole practitioner's experience and reputation in the field. In support of this claim, the petitioner has submitted letters from another attorney, a professor with whom the sole proprietor has worked, and a former client, discussing the sole proprietor's expertise and reputation as an immigration attorney who has been a sole practitioner since 2005. Similarly, the petitioner contends that the beneficiary will also generate income, which should be considered in determining the petitioner's ability to pay the proffered wage. However, a petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner becomes eligible under a new set of facts. *See Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm'r 1971). Moreover, there is no reliable evidence in the record, such as audited financial projections, a business plan, or other germane business records, to indicate that the petitioner is likely to have sufficient income in the future to establish its ability to pay the proffered wage, as it claims. It is also noted that despite the petitioner's claimed reputation and expertise, the only financial document in the record, the petitioner's 2011 return, tends to suggest that the petitioner currently possesses an insufficient revenue base to support a *bona fide* fulltime position, as the petitioner's reported gross

receipts alone were insufficient to cover the proffered wage in that year. In addition, nothing in the record demonstrates when the sole proprietor established her business, or how many employees she has. Also, at the time the AAO RFE was issued, the New York Unified Court System website search indicated that the sole proprietor, an attorney, was delinquent in registering with the state, as required. The sole proprietor has since re-registered; however, nothing in the record demonstrates the volume or the ongoing nature of the sole proprietor's business to support a *bona fide* offer of full-time employment. Further, the petitioner's reliance on "comprehensive immigration reform" is speculative in nature, forward looking, and cannot document the petitioner's current ability to pay the beneficiary the proffered wage. *See Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm'r 1971) (A petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner becomes eligible under a new set of facts).

Additionally, the AAO is not bound to follow the published decision of a United States district court in cases arising within the same district. *See Matter of K-S-*, 20 I&N Dec. 715 (BIA 1993). As indicated, the petitioner urges the consideration of the beneficiary's proposed employment as an indication that the petitioner's income will increase, citing *Masonry Masters, Inc. v. Thornburgh*, 875 F.2d 898 (D.C. Cir. 1989), in support of this assertion. Although part of this decision mentions the ability of the beneficiary to generate income, the holding is based on other grounds and is primarily a criticism of USCIS for failure to specify a formula used in determining the proffered wage.[6] Further, in this instance, no detail or documentation has been provided to explain how the beneficiary's employment as a lawyer will significantly increase profits for the petitioner. This hypothesis cannot be concluded to outweigh the evidence presented in the corporate tax returns. Lastly, the AAO notes again that the petitioner failed to establish that it had sufficient income from the 2012 priority date onward to pay the beneficiary the full proffered wage. Thus, assessing the totality of the circumstances in this individual case, it is concluded that the petitioner has not established that it had the continuing ability to pay the proffered wage.

In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). The petitioner has not met that burden.

ORDER: The appeal is dismissed.

[6] Subsequent to that decision, USCIS implemented a formula that involves assessing wages actually paid to the alien beneficiary, and the petitioner's net income and net current assets.